

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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Nº 07-CV-3753 (JFB) (WDW)

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RAMON FLORES,

Plaintiff,

VERSUS

STEVE LEVY, THOMAS J. SPOTA, III, WILMA PETERSON, LOUIS J. OHLIG, EDWARD  
VITALE, DOUGLAS M. O'CONNOR, JOHN A. BRAY, LINDA KEVINS, JOHN  
SCARGLATO, DANA BROWN,

Defendants.

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MEMORANDUM AND ORDER  
September 23, 2008

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JOSEPH F. BIANCO, District Judge:

Plaintiff Ramon Flores ("plaintiff" or "Flores"), brings this action against Suffolk County Executive Steve Levy ("Levy"), Suffolk County District Attorney Thomas J. Spota III ("Spota"), Assistant District Attorneys Linda Kevins ("Kevins"), Dana Brown ("Brown"), and John Scarglato ("Scarglato") (collectively, "defendant prosecutors"), Suffolk County Court Judge Louis J. Ohlig ("Judge Ohlig") (collectively, "County Defendants"), Legal Aid Society Attorneys Robert C. Mitchell ("Mitchell"), Edward "Ed" Vitale ("Vitale"), and Douglas M. O'Connor ("O'Connor") (collectively, "Legal Aid defendants"), John A. Bray, and Wilma Peterson, alleging malicious prosecution, conspiracy under 42 U.S.C. § 1983, and deliberate indifference, all arising from defendant's prosecution.

Defendants moved to dismiss the claims pursuant to Fed. R. Civ. P. 12(c). For the following reasons, defendants' motions are granted.

I. BACKGROUND

A. Facts

The following facts are taken from the complaint and are not findings of fact by the court. The Court assumes these facts to be true for the purpose of deciding this motion and construes them in the light most favorable to plaintiff, the non-moving party.

On February 20, 2003, Flores was arrested in Suffolk County and charged with one count of criminal assault in the second degree and one count of criminal contempt in the first

degree. (Compl. ¶ 1.) On February 25, 2003, an unidentified man came to see Flores and told him it was not advisable that he testify before the grand jury. (Compl. ¶ 3.) The unidentified man stated that he was not an attorney and that he could not answer any additional questions. (Compl. ¶ 3.) Later that afternoon, plaintiff appeared before the court and was provided with what he believed to be Legal Aid counsel. (Compl. ¶ 4.)

On March 5, 2003, plaintiff was taken to the Suffolk County Court and arraigned on indictment 493-03, which charged plaintiff with: 3 counts of assault in the second degree, 2 counts of criminal contempt in the first degree, aggravated contempt, and menacing. (Compl. ¶ 4.) Plaintiff informed the court that he still had no formal attorney of record. (Compl. ¶ 4A.) The Court appointed a Legal Aid attorney to represent plaintiff. (Compl. ¶ 4B.) After the arraignment, plaintiff complained to Legal Aid attorney Douglas O'Connor that plaintiff was not provided with an attorney at an earlier stage. (Compl. ¶ 4C.) O'Connor informed plaintiff that a motion to dismiss would be filed on the grounds that plaintiff was not afforded an opportunity to testify before the grand jury, and that plaintiff was not provided counsel at the time the grand jury was convened. (Compl. ¶ 4C.)

On April 3, 2004, plaintiff returned to court and spoke to his appointed Legal Aid attorney Edward Vitale. (Compl. ¶ 5.) Plaintiff reviewed the proposed motion to dismiss. (Compl. ¶ 5.) Plaintiff was unhappy that the motion did not raise the issue of plaintiff's prior lack of representation. (Compl. ¶ 5.) Plaintiff ordered Vitale not to file the motion. (Compl. ¶ 5.) Vitale became angry with plaintiff and told plaintiff he was "on his own." (Compl. ¶ 5.) Plaintiff notified the Court that he was not satisfied with the motion. (Compl. ¶ 5B.) Vitale

requested that he be removed as counsel for plaintiff. (Compl. ¶ 5B.) The Court granted Vitale's request and appointed John Bray as counsel. (Compl. ¶ 5B.) Further, the court provided plaintiff with additional time to file his motion to dismiss, in order to allow his newly appointed counsel to review the motion. (Compl. 5B.)

On April 8, 2003, the court formally appointed Bray as counsel. The case was adjourned for second call so that plaintiff and Bray could confer. (Compl. ¶ 6.) Plaintiff asked Bray to amend the motion to dismiss to include an affidavit, noting that plaintiff was not provided with counsel at the time of indictment. (Compl. ¶ 6A.) Bray refused to make the changes and argued with plaintiff. (Compl. ¶ 6A.) No second call occurred and the case was adjourned until April 28, 2003. Thereafter, plaintiff notes that Bray refused to assist him and was not responsive to plaintiff's requests. (Compl. ¶ 6B.) On April 18, 2003, plaintiff filed a motion to dismiss, asserting that he was not provided representation during a critical stage of the action. (Compl. ¶ 6C.) On April 26, 2004, plaintiff received legal mail containing an order from Judge Ohlig, dismissing the indictment based upon a lack of legal counsel provided to plaintiff. (Compl. ¶ 6D.)

On May 4, 2003, plaintiff filed three grievances with the Tenth Judicial District against O'Connor, Vitale, and Bray. (Compl. ¶ 7.) Plaintiff accused the attorneys of failing to safeguard his rights, lying to him, and failing to provide competent assistance. (Compl. ¶ 7.) In addition, plaintiff filed a grievance against Judge Ohlig alleging that he violated plaintiff's constitutional rights. (Compl. ¶ 7.)

On May 5, 2003, plaintiff appeared in court to testify before a second grand jury. (Compl.

¶ 8.) Plaintiff refused to testify before the grand jury because he did not trust Bray. (Compl. ¶ 8.) Plaintiff informed the court of his objections to Bray's representation. (Compl. ¶ 8A.) As a result of not testifying, plaintiff claims that he was unable to provide the mitigating defense of "Intoxication." (Compl. ¶ 8B.)

On May 19, 2003, plaintiff was arraigned on the superseding indictment 111-03, which contained the same 7 counts as the original indictment, plus an additional count of assault in the first degree. (Compl. ¶ 9.) Plaintiff alleges that the complainant testified before the grand jury that plaintiff had "knocked out her teeth" thereby implying that there was a loss of actual teeth, when, in fact, it was "broken bridge work." (Compl. ¶ 9Ai.) Plaintiff alleges that the prosecution knew this testimony was false because the medical records in the prosecution's possession indicated that it was broken bridge work and not a loss or break of actual teeth. (Compl. ¶ 9Aii.) Plaintiff concludes that the additional first degree assault charge was added as a punitive tactic designed to silence and stop plaintiff from "asserting and continuing to petition for redress" of his constitutional right to counsel. (Compl. ¶ 9B.)

In August of 2004, plaintiff was tried on the eight counts contained within the second indictment. (Compl. ¶ 11.) Plaintiff alleges that, on August 4, 2004, on direct examination, Wilma Peterson falsely testified that plaintiff had knocked out her teeth. (Compl. ¶ 13.) On August 5, 2004, Brown alluded to the fact that Ms. Peterson had the "knocked out teeth" repaired with bridge work. (Compl. ¶ 14.) Plaintiff shouted out that the alleged injury was broken bridge work and not actually teeth. (Compl. ¶ 14A.) The Court then asked Ms. Peterson whether plaintiff broke her teeth or bridge work. (Compl. ¶ 14A.) Ms. Peterson responded that it was bridge work which was

broken by plaintiff's actions. (Compl. ¶ 14A.) The prosecution allegedly failed to elicit a recantation from Ms. Peterson as to her testimony that she lost actual teeth. (Compl. ¶ 14B.)

On September 2, 2004, after a trial on the charges in the indictment before the court without a jury, plaintiff was convicted of Assault in the Second Degree under Counts 3 and 4, Menacing in the Second Degree under Count 5, Aggravated Criminal Contempt under Count 6, and Criminal Contempt in the First Degree under Count 7. (Compl. at A-2.) Plaintiff was acquitted on the crime of Assault in the First Degree under Count 1, Assault in the Second Degree under Count 2, and Criminal Contempt in the First Degree under Count 8. (Compl. at A-2 and A-3.) The court noted that the basis for acquittal on the Assault in the First Degree charge was the prosecution's failure to establish "serious physical injury," especially in the absence of testimony by a medical expert regarding the victim's condition. *See* September 2, 2004 Decision (Attached to Compl. at A-3) ("While the photographs introduced into evidence by the People did establish that the victim did suffer considerable bruises and a knife wound, these injuries did not rise to the level of serious under the definition found in the Penal Law.").

## B. Procedural History

On September 5, 2007, plaintiff filed this complaint alleging malicious prosecution, conspiracy, and deliberate indifference. On January 31, 2007, the Legal Aid defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). On February 1, 2008, the County Defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). On May 2, 2008, *pro se* defendant Wilma Peterson

filed an answer to the complaint. On May 27, 2008, plaintiff filed an opposition to defendants' motions to dismiss. On June 2, 2008, the Legal Aid defendants filed their reply brief. On June 6, 2008, the County defendants filed their reply brief. On June 22, 2008, Ms. Peterson moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). On September 2, 2008, plaintiff filed his opposition to Ms. Peterson's motion.

### C. Defendant's Motion to Strike

On August 8, 2008, *pro se* plaintiff filed a motion to strike Ms. Peterson's motion to dismiss. In particular, plaintiff objected to the fact that he did not receive copies of certain exhibits that Peterson attempted to file under seal with her motion to dismiss, which the Court declined to accept for filing and returned to the defendant because they were unnecessary for purposes of deciding the motion to dismiss and would not be considered by the Court. For the reasons discussed below, plaintiff's request to strike the motion on such grounds is frivolous.

On July 22, 2008, in connection with her motion to dismiss, *pro se* defendant attempted to file certain exhibits that consisted of medical records, which she requested be placed under seal and not provided to plaintiff. The purpose of these exhibits was to corroborate Ms. Peterson's description in her affidavit of the injuries, which she testified resulted from plaintiff's assault on her, and to explain why she mistakenly described her broken bridge work as her bottom teeth:

The plaintiff did punch me in my mouth, and, as I relived my horrific ordeal during my testimony in front of a second Grand Jury, I mistakenly described my broken bridge work

as my bottom teeth. However, I did not conspire with anyone to make any misleading statements. I was only trying to relate the horrible experience of the night the plaintiff assaulted me.

The medical documents the plaintiff made reference to which formed the basis of his complaint against me, also describes the extent of my injuries caused by the brutal acts he committed against me.

For more than three hours, during the plaintiff's assault on me, he repeatedly punched me all over my body, he stabbed me with a meat cleaver and a knife, he bit me on my body, spat in my face and pulled a significant amount of my hair out of my head. He hopped on my broken leg, of which, I was wearing a cast and stabbed my broken leg with a knife and a meat cleaver. Throughout the plaintiff's assault on me, he continuously threatened to cripple me, to blind me, to paralyze me and to kill me.

When the plaintiff punched me in my mouth, he hit me so hard that he indeed broke my bridge work in the bottom of my mouth which also cut a large gash inside my bottom lip and punctured a hole in my bottom lip. As to date, I continue to suffer from nerve damage in my bottom lip. I have a

permanent two and a half inch scar inside my bottom lip and a scar outside of my bottom lip from the punctured hole.

I have bruises all over my body. I had to see an optometrist for treatment of trauma to my eye. I have permanent scars on my forehead, hands and left leg. I continue to suffer from nerve damage in my left leg where he stabbed me with a knife. The plaintiff kicked me, very hard, in my lower back, thus, exacerbating a prior injury to my lower back that the plaintiff was aware of before he assaulted me. I now have facet damage in my lower back. And I am in constant pain.

(Peterson Affidavit, at 2-3) (citations omitted).

On July 22, 2008, the Court issued an order declining to accept these medical exhibits because the Court, for purposes of a motion to dismiss under Rule 12(b)(6), must accept the factual allegations set forth in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Cleveland v. Caplaw Enter.*, 448 F.3d 518, 521 (2d Cir. 2006); *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir. 2005). Thus, “the district court is normally required to look only to the allegations on the face of the complaint.” *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). Given this standard, the Court explained in the July 22 Order:

In the instant case, under this standard, the Court may not consider these medical records in connection with the motion to

dismiss; rather, the Court will determine whether the allegations in the complaint state a legal claim against the defendant. In other words, consideration of these medical exhibits is unnecessary for purposes of deciding the motion. Therefore, the Court is declining to accept these exhibits at this time and the Clerk of the Court shall return them to plaintiff. Because Exhibits C-G are not being accepted or considered by the Court, her application to have the records sealed is moot and defendant need not serve such exhibits on defendant.

(July 22, 2008 Order, at 1-2.)

Although plaintiff contends in his motion to strike that he cannot reply to defendant’s submission without such exhibits, that argument is frivolous. As noted above, the Court has assumed his allegations in the complaint to be true and has not considered these exhibits. In fact, that is the reason the Court declined to accept them. Moreover, none of the factual information contained in Ms. Peterson’s affidavit, and recited above, is pertinent to the legal issues in the motion to dismiss. Specifically, the primary issues, as discussed *infra*, based upon the allegations in the complaint, are (1) whether the private actor defendants (namely, Ms. Peterson and plaintiff’s court-appointed attorneys) can be sued under Section 1983, and (2) whether the prosecutors have absolute immunity. The nature and extent of Ms. Peterson’s injuries, as well as any medical records corroborating such injuries, have no relevance to the consideration of these legal issues. There is no basis to

require Ms. Peterson to supply these materials to plaintiff, and unnecessarily reveal private medical information, where the Court rejected them for filing because they have no relevance at the motion to dismiss stage in determining whether plaintiff has a plausible Section 1983 claim. Therefore, plaintiff's motion to strike the defendant's motion was denied on August 21, 2008, and he was directed to file his opposition by September 15, 2008, which plaintiff did do.

#### D. Standard of Review

In reviewing a motion to dismiss under Rule 12(b)(6), a court must accept the factual allegations set forth in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Cleveland v. Caplaw Enter.*, 448 F.3d 518, 521 (2d Cir. 2006); *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir. 2005). The plaintiff must satisfy "a flexible 'plausibility' standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007) (emphasis in original). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic*, 127 S. Ct. at 1974. The Court does not, therefore, require "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.*

Moreover, as the Second Circuit recently emphasized in *Sealed Plaintiff v. Sealed Defendant*, "[o]n occasions too numerous to count, we have reminded district courts that when [a] plaintiff proceeds *pro se*, . . . a court is obliged to construe his pleadings liberally. . . . This obligation entails, at the very least, a permissive application of the rules governing the

form of pleadings. . . . This is particularly so when the *pro se* plaintiff alleges that her civil rights have been violated. Accordingly, the dismissal of a *pro se* claim as insufficiently pleaded is appropriate only in the most unsustainable of cases." *Sealed Plaintiff v. Sealed Defendant*, No. 06-1590-cv, 2008 U.S. App. LEXIS 17113, at \*15-\*16 (2d Cir. Aug. 12, 2008) (citations and quotation marks omitted); *see also Weixel v. Bd. of Educ. of the City of N.Y.*, 287 F.3d 138, 145-46 (2d Cir. 2002) (holding that when plaintiff is appearing *pro se*, the Court shall "'construe [his complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggests.'") (quoting *Cruz v. Gomez*, 202 F.3d 593, 597 (2d Cir. 2000)); *accord Sharpe v. Conole*, 386 F.3d 483, 484 (2d Cir. 2004).

Finally, in connection with a motion to dismiss under Rule 12(b)(6), as noted above, the Court may only consider "facts stated in the complaint or documents attached to the complaint as exhibits or incorporated by reference." *Nechis*, 421 F.3d at 100; *accord Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). Here, plaintiff appended certain documents to his complaint and the Court has confined its review to the face of the complaint and the documents attached thereto by plaintiff.

#### II. PLAINTIFF'S CLAIMS UNDER 42 U.S.C. § 1983

To prevail on a claim under § 1983, a plaintiff must show: (1) the deprivation of any rights, privileges, or immunities secured by the Constitution and laws; (2) by a person acting under the color of state law. 42 U.S.C. § 1983. "Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere." *Sykes v. James*, 13

F.3d 515, 519 (2d Cir. 1993). “Claims for false arrest or malicious prosecution, brought under § 1983 to vindicate the Fourth and Fourteenth Amendment right to be free from unreasonable seizures, are ‘substantially the same’ as claims for false arrest or malicious prosecution under state law.” *Jocks v. Tavernier*, 316 F.3d 128, 134 (2d Cir. 2003) (quoting *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996) (false arrest) and citing *Conway v. Vill. of Mount Kisco*, 750 F.2d 205, 214 (2d Cir. 1984) (malicious prosecution)).

#### A. The Legal Aid Attorneys and Ms. Peterson

Plaintiff asserts Section 1983 claims against (1) Ms. Peterson based upon her allegedly false testimony in connection with his criminal case; and (2) his Legal Aid Attorneys for their alleged failure to adequately represent him in connection with his initial indictment. As discussed below, the Section 1983 claims against these defendants fail as a matter of law because (1) none of these defendants are state actors; and (2) plaintiff’s conclusory allegations of conspiracy between these defendants and state actors cannot withstand a motion to dismiss.<sup>1</sup>

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<sup>1</sup> As a threshold matter, there is a substantial question as to whether plaintiff can proceed at all on a malicious prosecution claim for his acquitted counts because they were so closely intertwined with his counts of conviction and are both felonies. The Court recognizes that, in contrast to false arrest claims, the Second Circuit has noted that a conviction on one claim does not necessarily absolve liability under § 1983 for malicious prosecution as to other criminal charges which were resolved favorably to plaintiff. See *Janetka v. Dabe*, 892 F.2d 187, 190 (2d Cir. 1989) (holding that claim of malicious prosecution on charge of resisting arrest, of which plaintiff was acquitted, was not barred by his conviction for disorderly conduct); see also *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991) (highlighting “the need to separately analyze the charges claimed to have been maliciously prosecuted”). Thus, for the same reasons

#### (1) State Action Requirement

An individual acts under color of state law when he or she exercises power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *Polk County v. Dodson*, 454 U.S. 312, 317-38 (1981) (quoting *United States v. Classic*, 313 U.S. 299 (1941)).

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in this case, a conviction on assault in the second degree does not necessarily bar a malicious prosecution claim on assault in the first degree or attempted assault in the first degree; rather, the Court should analyze a number of factors, including the relative seriousness of the two offenses, “whether the elements of each charge are different, whether one charge is a lesser included offense of the other, and whether the alleged actions were directed at different people.” *Pichardo v. N.Y. Police Dep’t.*, No. 98-CV-429 (DLC), 1998 WL 812049, at \*3 (S.D.N.Y. Nov. 18, 1998) (citing *Janetka*, 892 F.2d at 190); see also *Ostroski v. Town of Southold*, 443 F. Supp. 2d 325, 335-40 (E.D.N.Y. 2006) (discussing factors). Analyzing the various factors in the instant case – including that both crimes are felonies (and thus are both serious crimes), and arose out of the same incident – the Court concludes that the existence of probable cause as to the counts of conviction should preclude a malicious prosecution claim on the acquitted counts. In fact, as the judge who presided over the bench trial noted, the basis for the acquittal on the assault in the first degree (despite the conviction for assault in the second degree) was the prosecution’s failure to demonstrate serious injury. Thus, the acquitted charges are “so closely intertwined with the offense of conviction that there is no reasonable basis to conclude that the [dismissal of] these charges is sufficiently distinct to support a claim of malicious prosecution.” *Pichardo*, 1998 WL 812049, at \*4 (finding conviction on misdemeanor charge precluded malicious prosecution on felony assault count arising out of same incident). In any event, the Court finds that there are numerous other grounds for dismissal of the case, discussed in detail *infra*.

Thus, a deprivation of a federal statutory or Constitutional right is actionable under Section 1983 when such deprivation is caused “by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Under this standard, “generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law.” *West*, 487 U.S. at 50.

In the instant case, it is clear from the allegations of the complaint that neither Ms. Peterson who was the alleged victim of the assault that was the subject of plaintiff’s criminal trial, nor the Legal Aid Attorneys who represented plaintiff in the pre-trial stage, are state actors. With respect to his Legal Aid Attorneys, it is axiomatic that a “public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.” *Polk County v. Dodson*, 454 U.S. at 325; *see also Schnabel v. Abramson*, 232 F.3d 83, 87 (2d Cir. 2000) (“[A] legal aid society ordinarily is not a state actor amenable to suit under § 1983.”) (citations omitted); *Rodriguez v. Weprin*, 116 F.3d 62, 65-66 (2d Cir. 1997) (affirming dismissal of Section 1983 claim against court-appointed appellate attorney for alleged involvement in denial of speedy appeal and noting that “it is well-established that court-appointed attorneys performing a lawyer’s traditional functions as counsel to defendant do not act ‘under color of state law’ and therefore are not subject to suit under 42 U.S.C. § 1983”) (collecting cases); *Housand v. Heiman*, 594 F.2d 923, 924-25 (2d Cir. 1979) (“[P]ublic defenders or court-appointed defense attorneys do not ‘act under color of law.’”); *Sanchez v. Gazzillo*, No. 00-CV-6405 (JS)(MLO), 2001 U.S. Dist. LEXIS 7786, at \*17 (E.D.N.Y. June 5, 2001) (dismissing Section 1983 claim against plaintiff’s Legal Aid

attorneys). Similarly, with respect to Ms. Peterson, the fact that plaintiff alleges that she perjured herself as a witness at his trial does not transform her into a state actor. *See, e.g., Elmasri v. England*, 111 F. Supp. 2d 212, 221 (E.D.N.Y. 2000) (“[T]he mere fact that an individual testifies at a court proceeding does not render that person a state actor.”) (citing *Briscoe*, 460 U.S. at 329-30); *see also Mitchell v. Mid-Erie Counseling Service*, No. 05-CV-6169 CJS(P), 2005 WL 1579810, at \*3 (W.D.N.Y. June 29, 2005) (“‘A witness testifying in a state court proceeding – even if [she] is a state employee who has perjured [herself] – has not acted under color of state law for purposes of § 1983.’”)(quoting *McArthur v. Bell*, 788 F. Supp. 706, 710 (E.D.N.Y. 1992)).

Although these individuals are clearly not state actors, the Court recognizes that a private actor can be considered as acting under the color of state law for purposes of Section 1983 if the private actor was “‘a willful participant in joint activity with the State or its agents.’” *See Ciambriello*, 292 F.3d at 324 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)) (citation omitted). This potential liability also applies to a court-appointed attorney where the attorney “conspires with a state official to violate the plaintiff’s constitutional rights.” *Fisk v. Letterman*, 401 F. Supp. 2d 362, 378 (S.D.N.Y. 2005). Thus, the Court will next examine plaintiff’s conspiracy claim to determine whether the allegations are sufficient to survive a motion to dismiss.

## (2) Conspiracy Pursuant to § 1983

The plaintiff alleges that “all of the defendants . . . acted in collusion with the Suffolk County District Attorney’s Office and thereby UNDER COLOR OF STATE LAW to



violate my Federal and State 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendment Constitutional Rights of The Accused.” Specifically plaintiff alleges that the Legal Aid defendants conspired with the County Defendants, Bray, and Ms. Peterson to: (1) prevent him from testifying before a grand jury; (2) deny him effective assistance of counsel; and (3) charge him with additional, higher counts.

The mere use of the term “conspiracy” or “collusion” does not instantly transform a private actor into a state actor for purposes of Section 1983 and is clearly insufficient to satisfy Rule 12(b)(6) in connection with a Section 1983 conspiracy claim. *See Ciambriello*, 292 F.3d at 324 (“A merely conclusory allegation that a private entity acted in concert with a state actor does not suffice to state a § 1983 claim against the private entity.”). Instead, “[i]n order to survive a motion to dismiss on a § 1983 conspiracy claim, the plaintiff must allege (1) an agreement between two or more state actors, (2) concerted acts to inflict an unconstitutional injury, and (3) an overt act in furtherance of the goal.” *Carmody v. City of New York*, No. 05-CV-8084 (HB), 2006 U.S. Dist. LEXIS 25308, at \*16 (S.D.N.Y. May 11, 2006) (citing *Ciambriello v. County of Nassau*, 292 F.3d 307, 324-35 (2d Cir. 2002)). Vague and conclusory allegations that defendants have engaged in a conspiracy must be dismissed. *See Ciambriello*, 292 F.3d at 325 (dismissing conspiracy allegations where they were found “strictly conclusory”); *see also Walker v. Jastremski*, 430 F.3d 560, 564 n.5 (2d Cir. 2005) (“[C]onclusory or general allegations are insufficient to state a claim for conspiracy under § 1983.”) (citing *Ciambriello*); *Sommer v. Dixon*, 709 F.2d 173, 175 (2d Cir. 1983) (“A complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss.”); *Green v. Bartek*, No. 3:05-CV-1851, 2007 WL 4322780, at \*3 (D. Conn. Dec. 7, 2007) (“The

Second Circuit has consistently held that a claim of conspiracy to violate civil rights requires more than general allegations.”).

The need to guard against the use of conclusory allegations of conspiracy in the context of Section 1983 lawsuits against private actors is particularly compelling. If a plaintiff could overcome a motion to dismiss simply by alleging in a conclusory fashion a “conspiracy” between private actors and state actors, these private actors – including lawyers and witnesses – would be subjected to the substantial cost and disruption incurred by litigants in the discovery phase of these lawsuits, without any indication whatsoever that the plaintiff has a “plausible” conspiracy claim. As the Second Circuit has emphasized, these conspiracy claims are “so easily made and can precipitate such protracted proceedings with such disruption of governmental functions” that “detailed fact pleading is required to withstand a motion to dismiss” them. *Angola v. Civiletti*, 666 F.2d 1, 4 (2d Cir. 1981).

As discussed below, the complaint does not contain any specific allegations supporting a “plausible” conspiracy claim involving these private actors and the County Defendants. *Pro se* plaintiff’s complaint is nothing more than a compendium of conclusory, vague, and general allegations of a conspiracy to deprive him of constitutional rights. “Diffuse expansive allegations are insufficient, unless amplified by specific instances of misconduct.” *Ostrer v. Aronwald*, 567 F.2d 55, 533 (2d Cir. 1997). Of course, the Court recognizes that “[a plaintiff is not required to list the place and date of defendant[’]s meetings and the summary of their conversations when he pleads conspiracy, . . . but the pleadings must present facts tending to show agreement and concerted action.” *Fisk v. Letterman*, 401 F. Supp. 2d 362, 376

(S.D.N.Y. 2005) (report and recommendation), accepted by, in part, rejected by, in part, *Fisk v. Letterman*, 401 F. Supp. 2d 362 (S.D.N.Y. 2005) (citations and quotations omitted). As the Supreme Court recently articulated in *Bell Atlantic Corp. v. Twombly*, although a plaintiff does not need to provide detailed factual allegations, the allegations in the complaint must be “enough to raise a right to relief above the speculative level.” 127 S. Ct. at 1965.

#### i. Wilma Peterson

Plaintiff alleges that Ms. Peterson participated in the malicious prosecution against him by providing false testimony to the second grand jury and at trial that plaintiff had broke her bottom teeth. Moreover, plaintiff alleges that the defendant prosecutors were complicit in that perjury because the defendant prosecutors failed to correct the testimony. Nowhere in the complaint does plaintiff specifically assert that an explicit, or even implicit, agreement existed between Ms. Peterson and the defendant prosecutors to enter into a conspiracy. *See Ciambriello*, 292 F.3d at 324 (dismissing Section 1983 conspiracy claim because “[a]bsent from [plaintiff’s] complaint are any factual allegations suggesting that [the private actor defendant] conspired with the County”). Plaintiff simply relies on vague and conclusory allegations to imply that Ms. Peterson conspired with the defendant prosecutors. The mere allegation that Ms. Peterson committed perjury regarding damage to her teeth, and the prosecutor’s alleged failure to correct such testimony, is insufficient to support a conspiracy claim. *See, e.g., Rzyyeva v. United States*, 492 F. Supp. 2d 60 (D. Conn. 2007) (“Plaintiffs’ vague and conclusory allegations against private ‘conspirators’ are entirely unclear, unsupported by facts, and insufficient to substantiate their claims.”); *Fiske*, 401 F. Supp. 2d at 377 (“Communications between a private and a state actor, without facts

supporting a concerted effort or plan between the parties, are insufficient to make the private party a state actor.”); *see also Marion v. Groh*, 954 F. Supp. 39, 43 (D. Conn. 1997) (dismissing Section 1983 claim against a private citizen who testified against plaintiff at criminal trial where plaintiff made only generalized conspiracy allegations). Accordingly, plaintiff’s claims of conspiracy regarding Ms. Peterson must be dismissed.

#### ii. Legal Aid Defendants

Plaintiff alleges that the Legal Aid defendants engaged in numerous conspiracies with the other defendants which include: (1) denying plaintiff his right to counsel; (2) preventing plaintiff from testifying before the grand jury; (3) allowing the defendant prosecutors to “lift” the indictment into the county court; and (4) adding the additional charge of assault in the first degree to the indictment.

Viewing the allegations in the light most favorable to plaintiff, the Court finds that plaintiff has not alleged a conspiracy involving the Legal Aid defendants and any other named party. Plaintiff has failed to articulate any allegations that would suggest that these alleged failures in performance by his attorneys, even if accepted as true, could plausibly support a claim that the Legal Aid defendants were part of a conspiracy with the County defendants. In fact, plaintiff failed to allege that Legal Aid defendants entered into an explicit or implicit agreement with any other named party to this lawsuit. Moreover, as the Second Circuit has noted, generalized allegations of conspiracy “ring especially hollow” where, as here, the parties alleged to be part of the same conspiracy have an “adversarial relationship.” *Ciambriello*, 292 F.3d at 324. Given the complete absence of

anything other than conclusory allegations of conspiracy, the Section 1983 claims against his Legal Aid attorneys cannot survive a motion to dismiss. *See also Green v. Bartek*, No. 3:05CV1851 (SRU), 2007 WL 4322780, at \*3 (D. Conn. Dec. 7, 2007) (dismissing Section 1983 claim against plaintiff's appointed attorney in Family Court where, "[a]lthough [plaintiff] includes several statements regarding an alleged conspiracy, he includes no facts to support this claim"); *Williams v. Jurow*, No. 05 Civ. 6949 (DAB), 2007 WL 5463418, at \*12 (S.D.N.Y. June 29, 2007) ("Since plaintiff has alleged no facts that would, even if accepted as true, establish that the Legal Aid Defendants' conduct constituted state action, the constitutional claims against them should be dismissed.") (report and recommendation); *Brewster v. Nassau County*, 349 F. Supp. 2d 540, 547 (E.D.N.Y. 2004) (dismissing Section 1983 claim against Legal Aid Society where plaintiff alleged in a conclusory fashion that Legal Aid waived his rights and failed to adequately represent him in order to "benefit themselves and/or District Attorney," but did "not actually allege[] any facts indicating an agreement to act in concert to harm him"); *Hom v. Brennan*, 304 F. Supp. 2d 374, 378-79 (E.D.N.Y. 2004) (dismissing Section 1983 claim against supervising attorney with the Nassau-Suffolk Law Services because "plaintiff fails to allege with particularity what the alleged conspiracy is, the purpose of the conspiracy, who was involved in the conspiracy, the existence of an act in furtherance of the conspiracy, or that he was injured as a result of the conspiracy"); *Braxton v. Brown*, No. 96 CV 187, 1997 WL 43525, at \*3 (E.D.N.Y. Jan. 28, 1997) ("Notwithstanding the latitude afforded a *pro se* complaint, plaintiff fails to allege any facts supporting an inference that the Defense Attorney defendants colluded with the District Attorney defendants. While plaintiff's allegations might support a state law malpractice action against his former defense attorneys, they

do not support a federal court's exercise of jurisdiction under Section 1983.").

In sum, having failed to sufficiently allege a conspiracy cause of action between Ms. Peterson, the Legal Aid defendants, and any state actor, the Court dismisses the Section 1983 claim against Ms. Peterson and the Legal Aid defendants.<sup>2</sup>

### (3) Other Defects in Claims against the Legal Aid Defendants

In addition to the legal defects discussed in detail above, there are a number of other grounds set forth by the Legal Aid defendants which independently require dismissal of plaintiff's claims against them as a matter of law.

First, although plaintiff claims that his constitutional rights were violated by the Legal Aid defendants because they failed to ensure his right to appear before the grand jury and testify, it is axiomatic that there is no constitutional right to testify before the grand jury. *See Burwell v. Superintendent of Fishkill*

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<sup>2</sup> Defendant John A. Bray is the court-appointed attorney who replaced the Legal Aid defendants in defending plaintiff in his criminal case. (Compl. ¶ 6.) Although defendant Bray has never appeared in this action (and it is unclear whether he was ever served), the Court dismisses the claims against him *sua sponte* because, like the Legal Aid defendants, he is not a state actor. Plaintiff has failed to state a cause of action under Section 1983 against him and plaintiff's claim against Bray, like the other claims in this case, is frivolous. *See, e.g., Liner v. Goord*, 196 F.3d 132, (2d Cir. 1999) (holding that district court is authorized to "dismiss the complaint *sua sponte* if, among other things, the complaint is 'frivolous, malicious, or fails to states [sic] a claim upon which relief may be granted'") (quoting 28 U.S.C. § 1915(a) & (b)(1)).

*Correctional Facility*, No. 06 Civ. 787 (JFK), 2008 WL 2704319, at \*8 (S.D.N.Y. July 10, 2008) (“[T]here is no federal constitutional right to testify before the grand jury. In fact, there is no federal right to a grand jury in state criminal prosecutions.”); *Affser v. Murray*, No. 04 CV 2715, 2008 WL 2909367, at \*7 (E.D.N.Y. July 28, 2008) (“[C]ounsel’s alleged failure to secure petitioner’s presence before the grand jury does not constitute ineffective assistance”) (collecting cases). Thus, any claimed deprivation of such a right is not actionable under Section 1983. See *Frankos v. LaVallee*, 535 F.2d 1346, 1348 n.3 (2d Cir. 1976) (“The complaint alleges that appellees successfully conspired to prevent appellant from testifying at a grand jury investigation of the prison stabbing and that attorney Wylie was incompetent in handling plaintiff’s request to testify there. Since one must allege deprivation of a constitutional right under 42 U.S.C. § 1983 and 42 U.S.C. § 1985, and there is no claim that there is a constitutional right to testify at a grand jury proceeding, the judgment of dismissal of these claims for relief is affirmed for lack of subject matter jurisdiction.”).

Second, plaintiff suffered no injury from these alleged deprivations because, as set forth in plaintiff’s complaint, the court dismissed the initial indictment and a superseding indictment was presented to a second grand jury during which plaintiff had the opportunity to testify, but refused to do so. (Compl. ¶¶ 6(D), 8.) To the extent that plaintiff complains about the charges presented to the second grand jury or about his criminal trial, it is clear that he has no plausible claim for any such allegations against the Legal Aid defendants because they were replaced as his attorneys prior to the presentation of the superseding indictment to the second grand jury.

Third, plaintiff was convicted of all of the charges that were the subject of the initial indictment, which he claimed was the result of

ineffective and unconstitutional conduct by the Legal Aid defendants. According to the complaint, the additional higher count of assault in the first degree was only contained in the second grand jury, at a time when he was no longer represented by the Legal Aid defendants. (Compl. ¶ 9.) Therefore, any malicious prosecution claims, including any malicious prosecution conspiracy, against the Legal Aid defendants related to the charges in the first indictment are barred by Supreme Court’s decision in *Heck v. Humphrey*, 512 U.S. 477 (1994).<sup>3</sup>

Finally, even assuming *arguendo* that some Section 1983 claim could exist based solely on the alleged ineffective conduct by the Legal Aid defendants, it would be time-barred. With respect to Section 1983 and 1985 claims, federal courts generally apply the forum state’s statute of limitations for personal injury claims, which is three years in the State of New York. *Pearl v. City of Long Beach*, 296 F.3d 76, 79 (2d Cir. 2002) (Section 1983), *cert. denied*, 538 U.S. 922 (2003); *Paige v. Police Dep’t of Schenectady*, 264 F.3d 197, 199 n.2 (2d Cir. 2001) (Section 1985). Here, as set forth in the complaint, the Legal Aid defendants ceased

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<sup>3</sup> The Legal Aid defendants also note that the plaintiff appealed his conviction and raised all of the identical arguments he now asserts in this civil lawsuit regarding alleged defects in the indictment, malicious prosecution, and ineffective assistance of counsel. The Appellate Division, Second Department denied his appeal and found his arguments were without merit. See *People v. Flores*, 40 A.D. 876, 878 (2d Dep’t 2007) (“The defendant’s remaining contentions, including those raised in his supplemental pro se brief, that the indictment was defective, that he was maliciously prosecuted, and that he was deprived of the effective assistance of counsel, are without merit.”). The Court of Appeals also denied Flores leave to appeal. See *People v. Flores*, 9 N.Y.3d 875 (2007).

representing plaintiff in April 2003. (Compl. ¶ 6(D).) Because plaintiff commenced this action on September 5, 2007, more than three years after Legal Aid represented him, the claims against the Legal Aid defendants would be untimely even assuming they existed, which they do not for the other reasons outlined by the Court.

In sum, plaintiff does not have a plausible Section 1983 claim against the private actors – defendants Peterson, Mitchell, Vitale, O’Connor, and Bray – and such claims are dismissed as a matter of law under Rule 12(b)(6).

### B. Absolute Immunity

Plaintiff sues the various County Defendants – DA Spota and ADAs Kevins, Scarglato, and Brown – for allegedly improper conduct (1) in connection with his indictment in the grand jury by conspiring to deny him representation by counsel and to prevent him from testifying before the grand jury; and (2) in connection with his trial by eliciting perjured testimony from witnesses, including Ms. Peterson, and not correcting such testimony. Plaintiff asserts claims against these defendants for malicious prosecution, conspiracy to maliciously prosecute, and “deliberate indifference” to the fact that his rights were being violated in the above-referenced manners.

Defendants argue that the Court should dismiss plaintiff’s claims against DA Spota and ADAs Kevins, Scarglato, and Brown on the grounds of absolute immunity. As set forth below, the Court agrees. It is abundantly clear from a review of the conduct allegedly attributed to these prosecutors that all of the conduct was undertaken in their roles as Assistant District Attorneys (or in Mr. Spota’s instance, as District Attorney) during the active prosecution of plaintiff and, thus, they are absolutely immune

from a civil suit for damages under Section 1983.

“It is by now well established that a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is immune from a civil suit for damages under § 1983.” *Shmueli v. City of New York*, 424 F.3d 231, 236 (2d Cir. 2005) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 410, 431 (1976) (citation and quotation marks omitted)). “[D]istrict courts are encouraged to determine the availability of an absolute immunity defense at the earliest appropriate stage, and preferably before discovery. . . . This is because ‘[a]n absolute immunity defeats a suit at the outset, so long as the official’s actions were within the scope of the immunity.’” *Deronette v. City of New York*, No. 05-CV-5275, 2007 U.S. Dist. LEXIS 21766, at \*12 (E.D.N.Y. Mar. 27, 2007) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) and quoting *Imbler*, 424 U.S. at 419 n.13). However, the Second Circuit has held that in the context of a motion to dismiss under Rule 12(b)(6), “when it may not be gleaned from the complaint whether the conduct objected to was performed by the prosecutor in an advocacy or an investigatory role, the availability of absolute immunity from claims based on such conduct cannot be decided as a matter of law on a motion to dismiss.” *Hill v. City of New York*, 45 F.3d 653, 663 (2d Cir. 1995).

“In determining whether absolute immunity obtains, we apply a ‘functional approach,’ looking to the function being performed rather than to the office or identity of the defendant.” *Hill*, 45 F.3d at 660 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993)). In applying this functional approach, the Second Circuit has held that prosecutors are entitled to absolute immunity for conduct “‘intimately associated with the judicial phase of the

criminal process.” *Fielding v. Tollaksen*, No. 06-5393-cv, 2007 U.S. App. LEXIS 28939, at \*3-\*4 (2d Cir. Dec. 12, 2007) (quoting *Imbler*, 424 U.S. at 430); *Hill*, 45 F.3d at 661 (same). In particular, “[s]uch immunity . . . extends to acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State.” *Smith v. Bodak*, 147 F.3d 91, 94 (2d Cir. 1998) (citation and quotation marks omitted). On the other hand, “[w]hen a district attorney functions outside his or her role as an advocate for the People, the shield of immunity is absent. Immunity does not protect those acts a prosecutor performs in administration or investigation not undertaken in preparation for judicial proceedings.” *Hill*, 45 F.3d at 661; *see also Carabajal v. County of Nassau*, 271 F. Supp. 2d 415, 421 (E.D.N.Y. 2003) (“[W]hen a prosecutor supervises, conducts, or assists in the investigation of a crime, or gives advice as to the existence of probable cause to make a warrantless arrest – that is, when he performs functions normally associated with a police investigation – he loses his absolute protection from liability.”).

Once a court determines that a prosecutor was acting as an advocate, “a defendant’s motivation in performing such advocative functions as deciding to prosecute is irrelevant to the applicability of absolute immunity.” *Shmueli*, 424 F.3d at 237 (quoting *Bernard*, 356 F.3d at 502); *see also Kleinman v. Multnomah Cty.*, No. 03-1723-KI, 2004 U.S. Dist. LEXIS 21466, at \*18 (D. Or. Oct. 15, 2004) (“The Ninth Circuit has interpreted *Imbler* to support absolute prosecutorial immunity even when a plaintiff alleges that the prosecutor went forward with a prosecution he believed not to be supported by probable cause.”).

Plaintiff claims that defendant prosecutors maliciously commenced a criminal prosecution

against plaintiff “through fraud and perjury” and “without probable cause to believe [he] committed the crime.” *See Compl.* at 15. Specifically, plaintiff claims that the defendant prosecutors filed a second indictment with the additional charge of first degree assault, as punishment for plaintiff’s protestations that he was denied his right to counsel. *See id.* Plaintiff further alleges that this additional charge was added as retribution due to plaintiff’s grievances filed against the defendant prosecutors and Judge Ohlig. *See id.* In addition, plaintiff alleges that the defendant prosecutors knowingly elicited false testimony from Ms. Peterson in order to establish the necessary elements for first degree assault. (*See Compl.* at 16.)

“It is settled law that when a prosecutor presents evidence to a grand jury and at trial he is acting as an advocate and entitled to absolute immunity on claims that the evidence presented was false.” *Urrego v. U.S.*, No. 00 CV 1203, 2005 WL 1263291, at \*2 (E.D.N.Y. May 27, 2005) (finding that a prosecutor is entitled to absolute immunity where he was alleged to have presented false evidence in order to obtain a superceding indictment) (citing *Buckley*, 509 U.S. 260; *Hill*, 45 F.3d at 662; *Bernard v. County of Suffolk*, 356 F.3d 495, 505 (2d Cir. 2003)); *see also Storck v. Suffolk County Dep’t of Social Servs.*, 62 F. Supp. 2d 927, 943 (E.D.N.Y. 1999) (“A prosecutor is also absolutely immune from charges alleging the withholding of exculpatory evidence from a grand jury and suppressing *Brady* material. An allegation of conspiracy to perform the foregoing acts does not change the conclusion that the acts are entitled to absolute immunity.”) (citations omitted). “[A]bsolute immunity protects a prosecutor from § 1983 liability for virtually all acts, regardless of motivation, associated with his function as an advocate. This would

even include . . . allegedly conspiring to present false evidence at a criminal trial.” *Dory v. Ryan*, 999 F.2d 679 (2d Cir. 1993), *as modified at* 25 F.3d 81, 83 (2d Cir. 1994). In *Tellier v. Petrillo*, plaintiff alleged that the United States attorneys had “formed a conspiracy to fabricate a new charge, not contained in the original indictment” and had “conspired to present the fabricated evidence to a grand jury in order to obtain a superceding indictment.” 133 F.3d 907 (2d Cir. 1997.) The Second Circuit affirmed the dismissal of the complaint, noting that the presentation of a superceding indictment was protected by absolute immunity. *Id.* Further, the Second Circuit has specifically held that a prosecutor’s determination of which offenses to charge also is protected by absolute immunity. *Ying Jing Gan v. City of New York*, 996 F.2d 522, 530 (2d Cir. 1993).

It is clear that defendant prosecutors’ decision to seek a second indictment with the additional charge of first degree assault, as well as any alleged attempt to elicit false testimony from a witness, would be protected by absolute immunity. Similarly, defendants are absolutely immune from suit for any of the wrongful acts alleged in the complaint by plaintiff related to his claim that they presented perjured testimony at trial. Finally, any claim that the prosecutors deprived plaintiff of his right to testify before the first grand jury is also within the ambit of absolute immunity.<sup>4</sup> *See, e.g., Phillips v. Eppolito*, No. 02 Civ. 5662 (DLC), 2004 WL

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<sup>4</sup> To the extent that plaintiff is attempting to argue that absolute immunity should not apply because of some conspiracy between the County Defendants and private actors (such as the Legal Aid defendants and Ms. Peterson), that claim also fails for the reasons discussed in great detail in connection with the Legal Aid defendants and Ms. Peterson. Specifically, plaintiff alleges nothing more than conclusory allegations of conspiracy which are insufficient to survive a motion to dismiss.

540481, at \*2 (S.D.N.Y. March 17, 2004) (“The Complaint asserts that [the ADA] failed to permit [plaintiff] to testify in front of the Grand Jury. The act of failing to permit [plaintiff] to testify before a Grand Jury falls within the scope of activities protected by the doctrine of absolute immunity. Therefore, the claim of malicious prosecution against [the ADA] must be dismissed.”); *Braxton v. Brown*, No. 96 CV 187, 1997 WL 43525, at \*2 (E.D.N.Y. Jan. 28, 1997) (“Plaintiff’s complaint against the District Attorney defendants – that they denied him the right to testify before the Grand Jury – is based on their presentation of a case before the Grand Jury. It therefore falls within the scope of the prosecutors’ absolute immunity.”).

Accordingly, plaintiff’s claims against the defendants Spota, Kevins, Scarglato, and Brown are dismissed based on the doctrine of absolute immunity.<sup>5</sup>

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<sup>5</sup> Plaintiff also alleges that Judge Ohlig conspired with the Legal Aid defendants and the defendant prosecutors to maliciously prosecute the plaintiff. Although Judge Ohlig has failed to appear in the case, the Court, *sua sponte*, finds that Judge Ohlig is entitled to absolute immunity. “A judge defending against a section 1983 suit is entitled to absolute immunity from damages for actions performed in his judicial capacity.” *Fields v. Soloff*, 920 F.2d 1114, 1119 (2d Cir. 1990). Where a judge is acting in a judicial capacity, no liability exists even if the judicial action “was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction.” *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). “[F]undamentally, since absolute immunity spares the official any scrutiny of his motives, an allegation that an act was done pursuant to a conspiracy has no greater effect than an allegation that it was done in bad faith or with malice, neither of which defeats a claim of absolute immunity.” *Dorman v. Higgins*, 821 F.2d 133, 139 (2d Cir.

### C. Deliberate Indifference

Defendants also move to dismiss the claim for “deliberate indifference” to the alleged violations of his constitutional rights. As a threshold matter, any attempt to assert such a claim against the District Attorney, or the Assistant District Attorneys or Judge Ohlig, must be dismissed based on the doctrine of absolute immunity as described *supra*. Similarly, any attempt to bring such a claim against the private actor defendants – Ms. Peterson, the Legal Aid defendants, or court-appointed attorney Bray – must be dismissed for the reasons outlined *supra*.

With respect to the only remaining defendant, County Executive Steve Levy, there is simply no plausible cause of action under Section 1983. To the extent plaintiff is attempting to sue Mr. Levy in his individual capacity, it is beyond cavil that the County Executive cannot be held responsible for the actions of the independently-elected District Attorney’s decision to indict and prosecute a defendant. Similarly, to the extent that Mr. Levy is being sued in his official capacity in an attempt to allege some type of municipal liability against the County, that claim must also fail as a matter of law. A district attorney in New York State, when prosecuting a criminal matter, acts in a quasi-judicial manner and represents the State, not the County. Thus, a county cannot establish policy in connection with how a district attorney should prosecute New York State penal laws. Therefore, no municipal liability can arise from the District Attorney’s decision to prosecute. In short,

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1987). Plaintiff alleges that the judge failed to rule on plaintiff’s motion and back-dated his ruling. Any action taken by Judge Ohlig in connection with rendering a decision or acting upon plaintiff’s motion is clearly within the judicial capacity of the court. Accordingly, Judge Ohlig is absolutely immune from suit and plaintiff’s claims against Judge Ohlig are dismissed.

plaintiff has failed to articulate any plausible claim for municipal liability given his allegations in the complaint. Accordingly, the claim against the County Executive and any municipal liability claim must be dismissed as a matter of law.

### D. Leave to Replead

Although plaintiff has not requested leave to amend or replead his complaint, the Court has considered whether plaintiff should be given an opportunity to replead. The Second Circuit has emphasized that

*A pro se* complaint is to be read liberally. Certainly the court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.

*Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (quotations and citations omitted). Under Rule 15(a) of the Federal Rules of Civil Procedure, “leave [to amend] shall be freely given when justice so requires.” Fed.R.Civ.P. 15(a). However, even under this liberal standard, this Court finds that any attempt to amend the pleading in this case would be futile.<sup>6</sup> As discussed in detail *supra*, it is clear from the complaint (as well as plaintiff’s detailed submissions in opposition to the motion) that he does not have any possibility of asserting a plausible Section 1983 claim. This lawsuit is a blatant and frivolous attempt to sue

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<sup>6</sup> In reaching this determination, the Court has reviewed all of the plaintiff’s submissions, including the documents that he attached to his opposition, all of which confirm the futility of any amendment as to the proposed federal claims.



private actors – such as the key prosecution witness (Ms. Peterson) and his court-appointed criminal defense attorneys – because he believes that they separately contributed to his indictment and conviction, even though such actors clearly do not have Section 1983 liability given the allegations in plaintiff’s complaint. *See, e.g., Contes v. City of New York*, No. 99 Civ. 1597 (SAS), 1999 WL 500140, at \*11 (S.D.N.Y. July 14, 1999) (“It would be futile to grant leave to replead in this case. Without state action, which is lacking here, [plaintiff] cannot prevail on a claim pursuant to § 1983.”). Similarly, plaintiff sues the District Attorney and ADAs even though their alleged wrongful conduct in the grand jury and at trial, which is described in the complaint, is clearly protected by absolute immunity. In essence, plaintiff is primarily seeking to re-litigate issues, via this civil lawsuit, that he unsuccessfully challenged on direct appeal in seeking to have his conviction overturned against parties who have no Section 1983 liability even if the facts alleged in his complaint are true. After carefully reviewing all of plaintiff’s submissions, it is abundantly clear that no amendments can cure these pleading deficiencies and any attempt to replead would be futile. *See Cuoco*, 222 F.3d at 112 (“The problem with [plaintiff’s] cause[] of action is substantive; better pleading will not cure it. Repleading would thus be futile. Such a futile request to replead should be denied.”); *see also Hayden v. County of Nassau*, 180 F.3d 42, 54 (2d Cir. 1999) (holding that if a plaintiff cannot demonstrate he is able to amend his complaint “in a manner which would survive dismissal, opportunity to replead is rightfully denied”).

### III. CONCLUSION

For the foregoing reasons, defendants’ motions to dismiss plaintiff’s claims are GRANTED in their entirety. The Clerk of the Court shall enter judgment accordingly and close this case.

The Court certifies, pursuant to 28 U.S.C. § 1915 (a)(3), that any appeal from this order would not be taken in good faith; therefore, *in forma pauperis* status is denied for purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

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JOSEPH F. BIANCO  
United States District Judge

Dated: September 23, 2008  
Central Islip, NY

\* \* \*

Plaintiff Ramon Flores is appearing in this action *pro se*. Defendant Wilma Peterson is appearing in this action *pro se*. The attorney for defendants Thomas J. Spota III, Linda Kevins, John Scarglato, Dana Brown and Steve Levy is Assistant Suffolk County Attorney Brian C. Mitchell, H. Lee Dennison Building, 100 Veterans Memorial Highway, P.O. Box 6100, Hauppauge, New York 11788. The attorney for defendants Robert C. Mitchell, Edward Vitale, and Douglas O’Connor is Amy M. Monahan of L’Abbate, Balkan, Colavitta & Contini LLP, 1050 Franklin Avenue, 4<sup>th</sup> Floor, Garden City, NY 11530.